

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

JIMMY L. BANKS,

Plaintiff,

vs.

FREDDIE MAC aka FEDERAL HOME  
 LOAN MORTGAGE CORPORATION, a  
 Virginia corporation, et al.,

Defendants.

Case No.2:11-cv-00648-GMN-CWH

**ORDER**

This action arises out of the foreclosure proceedings initiated against the property of Plaintiff Jimmy L. Banks, who is appearing *pro se*. Pending before the Court are Defendants Ocwen Loan Servicing, LLC (“Ocwen”) and the Cooper Castle Law Firm’s (“CCLF”) Motion for Summary Judgment,<sup>1</sup> (ECF No. 148), and Motion to Expunge Lis Pendens, (ECF No. 147). Plaintiff opposed both motions. (ECF No. 154, 155).<sup>2</sup> Defendants replied. (ECF No. 165).

For the reasons discussed below, the motions are DENIED.

**I. BACKGROUND**

This case arises from an alleged wrongful foreclosure. The facts giving rise to this case are set out more particularly in this Court’s prior Orders. (Order Grant’g Mot. to Dismiss, ECF

---

<sup>1</sup> In an effort to facilitate a speedy resolution of this case, the Court conducted a preliminary review of the motion and noted several evidentiary defects, which would prevent timely resolution of the matter. (ECF No. 151). The Court allowed Defendants an opportunity to cure those noted defects. (*Id.*) Defendants filed documents purporting to cure the noted deficiencies. (ECF No. 156). The Court allowed Plaintiff an opportunity to respond to the new filing. (ECF No. 157). In response, Plaintiff filed an opposition to exclude the documents attempting to cure the noted deficiencies arguing that the exhibits and witnesses were not disclosed in discovery. (ECF No. 162). Defendants filed a reply. (ECF No. 164).

<sup>2</sup> The Court has already denied Plaintiff’s Motion to Strike, ECF No. 153, but considers the arguments in determining whether the “proffered material may properly be relied upon.” *United States v. Crisp*, 190 F.R.D. 546, 550–51 (E.D. Cal. 1999) (internal citations omitted).

Nos. 33, 101). The facts pertinent to this motion are that Plaintiff filed an Amended Complaint on December 12, 2011 alleging thirteen claims for relief against Defendants. On March 20, 2013, the Court granted Defendants' Motion to Dismiss as to all claims against Defendants Ticor Title of Nevada, Freddie Mac, Merscorp, Inc., and Mortgage Electronic Registration Systems, Inc. with prejudice. (ECF No. 101).

The only remaining issue left for adjudication was a single claim for statutory wrongful foreclosure against Ocwen and CCLF under NRS § 107.080(3). (*Id.* at 7). As to that claim, the Court held that Plaintiff had adequately stated a statutory wrongful foreclosure claim by alleging that "he did not receive a mailed copy of the notice of default and trustee's sale," prior to the filing of the Notice of Default. (*Id.* at 6). Thus, the Court held that "Plaintiff [had] pled a plausible claim for statutorily defective foreclosure against CCLF, as the trustee who filed the Notice of Default and Notice of Trustee's Sale, and Ocwen, as the beneficiary." (*Id.* at 7).<sup>3</sup>

As to statutory wrongful foreclosure, Plaintiff's allegations related to whether certain statutorily mandated notices were properly recorded, and whether he personally received the statutorily mandated notices. (*See* Amended Compl., ECF No. 34, at ¶ 86-102). Initially, Plaintiff alleged that "the parties issuing the notice of default and/or issuing a notice of trustee's sale on the property were not the proper parties to do so because none of the parties were the beneficiary, the successor in interest to the beneficiary, or the trustee appointed by the lender." (*Id.* at ¶ 86). To that end, Plaintiff asserted that Defendants filed the Notice of Default before being named Trustee. (*Id.* at ¶ 100). Plaintiff went on to allege that the Defendants did not properly record the Notice of Substitution of Trustee, (*id.* at ¶ 101), and Defendants failed to provide Plaintiff with statutorily mandated notice of the Notice of Substitution of Trustee,

---

<sup>3</sup> To the extent that any claim relied on legal theories that MERS is a sham beneficiary, or that securitization voids the deed of trust, irreparably splits the note, or extinguishes the note, the Court dismissed the claims with prejudice.

1 Notice of Default, or Notice of the Trustee's Sale. (*Id.* at 102).

2 Defendants now seek summary judgment arguing that "the facts are undisputed that  
3 Defendants complied with the foreclosure requirements set forth in NRS Chapter 107." (ECF  
4 No. 148 at 3).

## 5 **II. LEGAL STANDARD**

6 The Federal Rules of Civil Procedure provide for summary adjudication when the  
7 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
8 affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant  
9 is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that  
10 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
11 (1986). Factual disputes whose resolution would not affect the outcome of the suit are  
12 irrelevant to the consideration of a motion for summary judgment. *Id.*

13 A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable  
14 jury to return a verdict for the nonmoving party. *See id.* "Summary judgment is inappropriate if  
15 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict  
16 in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th  
17 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A  
18 principal purpose of summary judgment is "to isolate and dispose of factually unsupported  
19 claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

20 In determining summary judgment, a court applies a burden-shifting analysis. When the  
21 nonmoving party bears the burden of proving the claim or defense, the moving party can meet  
22 its burden in two ways: (1) by presenting evidence to negate an essential element of the  
23 nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a  
24 showing sufficient to establish an element essential to that party's case on which that party will  
25 bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24.

1 Once the moving party satisfies Rule 56's requirements, the burden shifts to the party  
2 resisting the motion to "set forth specific facts showing that there is a genuine issue for trial."  
3 *Anderson*, 477 U.S. at 256. The nonmoving party "may not rely on denials in the pleadings but  
4 must produce specific evidence, through affidavits or admissible discovery material, to show  
5 that the dispute exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and  
6 "must do more than simply show that there is some metaphysical doubt as to the material  
7 facts." *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted).

### 8 **III. DISCUSSION**

9 The Court first must note that this case has been unnecessarily complicated and  
10 protracted due to the lack of diligence exhibited by the Defendants and their counsel. What  
11 was otherwise a straight-forward, simple statutory wrongful foreclosure case has become a  
12 procedural quagmire because of Defendants' counsel's failure to follow the Federal Rules of  
13 Civil Procedure and the Court's Rules of Local Practice. Rather than being able to adjudicate  
14 this otherwise simple case in a timely and efficient manner, Defendants and their counsel were  
15 required to show cause as to why they should not be sanctioned and the Court has had to to  
16 caution and reprimand them for their recklessness. The Court has already denied Defendants'  
17 first summary judgment motion because of what can only be described as careless lawyering.  
18 The Court has allowed this second summary judgment motion in the hope that the case can be  
19 resolved without sending this very simple case to a jury.

20 The Court conducted a cursory preliminary review of this motion which revealed clear  
21 and blatant evidentiary issues - affidavits were proffered to authenticate exhibits but the  
22 affiant's identities were not provided in any way. Thus, to expedite resolution of the matter, the  
23 Court notified the Defendants of the facially obvious deficiencies, allowed Defendants a single  
24 opportunity to correct those deficiencies only, extended deadlines for Plaintiff's opposition and  
25 Defendants' reply, and reset the trial date. The Court did not hold that merely identifying the

1 affiants would cure all authentication defects, but rather that these glaring deficiencies alone  
2 would prevent resolution of the matter in Defendant's favor. That these delays and procedural  
3 missteps were caused by Defendants, one of whom is a law firm and both of whom are  
4 represented by counsel is particularly troubling. More troubling is that Defendants' other  
5 proffered exhibits also present authentication issues.

6 As Defendants have proffered several documents in support of its summary judgment  
7 motion, and Plaintiff has objected to nearly all the exhibits, the Court first determines what  
8 evidence it may consider in evaluating this motion. Then, the Court will consider only the  
9 admissible evidence in determining whether there exist any genuine issues of material fact  
10 precluding summary judgment and whether Defendants are entitled to judgment as a matter of  
11 law.

12 A. Authenticated Documents

13 In determining a summary judgment motion, the Court may only consider admissible  
14 evidence. Fed. R. Civ. P. 56(e), *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th  
15 Cir. 1988). To be admissible, a proper foundation must be laid and documents must be  
16 authenticated. *Id.*, *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987). A  
17 document may be authenticated by personal knowledge "by a witness who wrote it, signed it,  
18 used it, or saw others do so." *Orr*, 285 F.3d at 774 n.8 (citing references omitted). Documents  
19 authenticated through personal knowledge must be "attached to an affidavit that meets the  
20 requirements of [Fed.R.Civ.P.] 56(e) and the affiant must be a person through whom the  
21 exhibits could be admitted into evidence." *Canada*, 831 F.2d at 925 (9th Cir. 1987). To meet  
22 the requirements Rule 56(e), the affidavit must be made on personal knowledge, the affiant  
23 must be competent to testify to the matters stated in the affidavit, and sworn or certified copies  
24 of all papers referred to in an affidavit must be attached to it. *See* Fed.R.Civ.P. 56(e); *see also*  
25 *Orr*, 285 F.3d at 774 n.9 (citing references omitted).

1                   *i. Exhibit F – Affidavit of Mailing Notice of Trustee’s Sale*

2           Defendants’ Exhibit F is an affidavit intended to authenticate and demonstrate that the  
3 “Notice of Trustee’s Sale” was sent via certified mail, return receipt requested, to the Plaintiff.  
4 Although the affidavit itself does not identify the affiant, *see* ECF No. 148, Ex. F, Defendants  
5 cured the Court-noted defect via the Declaration of Amy Rawlings-Wharton, the notary public  
6 who witnessed Toni Castiglione sign the document, and who recognized Ms. Castiglione’s  
7 signature based on her own personal knowledge of the affiant who was a co-worker at the time  
8 of the signing. ECF No. 156, Ex. 1, at 1. The Court finds that Ms. Rawlings-Wharton’s  
9 Declaration properly authenticates Exhibit F – the affidavit of mailing notice of trustee’s sale,  
10 such that Exhibit F is legally admissible for the Court’s consideration.

11           In evaluating the evidentiary value of Exhibit F, the Court finds that sufficient evidence  
12 for a reasonable jury to determine that Ms. Castiglione had personal knowledge that the notice  
13 was sent as she declares that she was the person who mailed the notice. The affidavit  
14 specifically refers to a “Notice of Trustee Sale,” testifies that a “true and correct copy” of the  
15 same is attached as an exhibit, and a copy of the document is actually attached. *Exhibit I –*  
16 *Affidavit of Mailing Notice of Default.*

17           Defendants’ Exhibit I is an affidavit intended to authenticate and demonstrate that the  
18 attached “Notice of Breach and Default and of Election to Cause Sale of Real Property Under  
19 Deed of Trust” was sent via certified mail, return receipt requested, to the Plaintiff. Although  
20 the affidavit itself does not identify the affiant, *see* ECF No. 148, Ex. I, Defendants attempted  
21 to cure the Court-noted defect via the Declaration of Mandi Foht, an employee of CCLF. Ms.  
22 Foht declared that the signature was that of Christina Atha, a CCLF employee who was  
23 responsible for mailing foreclosure notices. Ms. Foht based her knowledge on her familiarity  
24 with Ms. Atha’s signature and its similarity to Ms. Atha’s employment agreement, which  
25 contained her signature and matched that of the affiant. ECF No. 156, Ex.2, at 1. Therefore, the

1 evidence is legally admissible for the Court's consideration. As the person who mailed the  
2 notice, Ms. Atha declares that she had personal knowledge that the notice was sent.  
3 Additionally, the affidavit testifies that a "true and correct copy" of the notice is attached as an  
4 exhibit, and a copy of the document is actually attached. Thus, Exhibit I provides sufficient  
5 evidence for a reasonable jury to determine that the Notice was sent to the Plaintiff. *Exhibits J,*  
6 *M, & P – Affidavit of Posting (Notice of Default), Affidavit of Posting (Notice of Sale); Affidavit*  
7 *of Service/Posting (Danger Notice).*

8 Defendants' Exhibit J is an Affidavit intended to authenticate and demonstrate that "a  
9 copy of the Notice of Default" was posted on the Property. Defendants' Exhibit M is an  
10 Affidavit intended to authenticate and demonstrate that "a copy of the Notice of Sale, as well as  
11 a copy of the Notice to Tenants of the Property," was posted on the Property. Defendants'  
12 Exhibit P is an Affidavit intended to authenticate and demonstrate that "a copy of the Danger  
13 Notice, as well as a copy of the Promissory Note attached to it," was served on Plaintiff and  
14 posted on the Property. Attached to the affidavits are copies of photos and alleged information  
15 about when, where, and by whom the photos were taken.

16 Unfortunately, these exhibits have not been properly authenticated for two reasons:  
17 first, the affidavits refer to certain notices but sworn or certified copies of the notices are not  
18 attached; therefore, an essential prerequisite to authentication has not been met. *See*  
19 *Fed.R.Civ.P. 56(e); see also Orr*, 285 F.3d at 774 n.9 (citing references omitted).<sup>4</sup> Second, the  
20 photos were not mentioned in the affidavits, nor were any mention made in the affidavits about  
21 when, where, and by whom the photos were taken. Therefore, the photos have not been  
22 properly authenticated. Exhibits J, M, and P are inadmissible in their current form, and cannot  
23

---

24  
25 <sup>4</sup> In a case concerned the sufficiency of statutory notices, what exactly was posted is of paramount importance. Thus, even if the Court were able to consider the affidavit, it does not contain any evidence that would assist the Court in reaching a determination of the merits. The Court would still be unable to determine what the posted notice contained.



1 be considered by the Court.

2 *ii. Exhibit L – Nevada Declaration of Posting in a Public Place*

3 Defendants' Exhibit L is an affidavit intended to authenticate and demonstrate that "a  
4 copy of the Notice of Trustee's Sale" was posted in a public place in Clark County. However,  
5 this exhibit has not been properly authenticated. The affidavit refers to a "Notice of Trustee's  
6 Sale," and does purport to attach a copy, but the submitted declaration does not actually include  
7 a sworn or certified copy of the same. Therefore, an essential prerequisite to authentication has  
8 not been met. *See* Fed.R.Civ.P. 56(e); *see also Orr*, 285 F.3d at 774 n.9 (citing references  
9 omitted). Thus, Exhibit L has not been properly authenticated, is inadmissible in its current  
10 form, and cannot be considered by the Court.

11 *iii. Exhibit N – Affidavit of Publication*

12 Defendant's Exhibit N is an affidavit intended to authenticate and demonstrate that the  
13 "Notice of Trustee's Sale" was published in "Nevada Legal News, a daily newspaper of general  
14 circulation" in Clark County, Nevada. As the Assistant Operations Manager of Nevada Legal  
15 News, the affiant, Heather Ebnetter could be a person who had personal knowledge through  
16 whom the evidence of publication could be admitted. Additionally, the affidavit refers to a  
17 publication, and a copy of the document is actually attached. Thus, Exhibit F is properly  
18 authenticated and may be considered.

19 *iv. Exhibit O – Certificate of Mailing (Notice to Tenants)*

20 Exhibit O is a certification intended to authenticate and demonstrate that the "Notice to  
21 Tenants of the Property" was sent via certified mail, return receipt requested, to the Occupant  
22 of the Property. Although the affidavit itself does not identify the affiant, *see* ECF No. 148, Ex.  
23 I, Defendants attempted to cure the Court-noted defect via the Declaration of Amy Rawlings-  
24 Wharton, the notary public who witnessed Toni Castiglione sign numerous documents,<sup>5</sup> and

---

25 <sup>5</sup> Including Exhibit F, which has already been found to be admissible.



1 who recognized Ms. Castiglione's signature based on her personal knowledge. ECF No. 156,  
 2 Ex. 1, at 1. Therefore, the evidence of the affiant's identity is legally sufficient for the Court's  
 3 consideration. As the person who mailed the notice, Ms. Rawlings-Wharton could be a person  
 4 who had personal knowledge that the notice was sent. However, while the certification refers  
 5 to a "Notice to Tenants of the Property," a sworn or certified copy of the same is not attached.  
 6 Therefore, an essential prerequisite to authentication has not been met. *See* Fed.R.Civ.P. 56(e);  
 7 *see also Orr*, 285 F.3d at 774 n.9 (citing references omitted). Exhibit O has not been properly  
 8 authenticated, is inadmissible in its current form, and cannot be considered.

9 v. *Exhibit Q – Affidavit of Mailing of Notice of Default and*  
 10 *Election/Waiver of Mediation Form*

11 Defendants' Exhibit Q is an affidavit intended to authenticate and demonstrate that the  
 12 attached "Notice of Default and Election/Waiver of Mediation Form" was sent via certified  
 13 mail, return receipt requested, to the Plaintiff. Although the affidavit itself does not identify the  
 14 affiant, *see* ECF No. 148, Ex. I, Defendants cured the Court-noted defect via the declaration of  
 15 Mandi Foht, an employee of CCLF. Ms. Foht declared that the signature was of Christina  
 16 Atha, a CCLF employee who was responsible for mailing foreclosure notices. Ms. Foht based  
 17 her declaration on her familiarity with Ms. Atha's signature and Ms. Atha's employment  
 18 agreement, which contained her signature and matched that of the affiant. ECF No. 156, Ex.2,  
 19 at 1. Therefore, the evidence is legally sufficient for the Court's consideration. As the person  
 20 who mailed the notice, Ms. Atha could be a person who had personal knowledge that the notice  
 21 was sent. Additionally, the affidavit testifies that a "true and correct copy" of the notice is  
 22 attached as an exhibit, and a copy of the document is actually attached. Thus, Exhibit Q is  
 23 properly authenticated and may be considered.

24 In sum, the Court may only consider Exhibit F – Affidavit of Mailing Notice of  
 25 Trustee's Sale, Exhibit I – Affidavit of Mailing Notice of Default, Exhibit N – Affidavit of

1 Publication, and Exhibit Q – Affidavit of Mailing of Notice of Default and Election/Waiver of  
2 Mediation Form. The Court may not consider any other proffered evidence as described,  
3 *supra*.

4 B. Nevada's Foreclosure Statutes

5 When a grantor of a deed of trust breaches the obligation contained therein, the trustee  
6 may sell the property to satisfy the obligation. NRS 107.080(1). Nevada Revised Statute  
7 107.080 provides the mandated notice provisions for trustee's sales.

8 First, the beneficiary, the successor in interest of the beneficiary or the trustee, must  
9 record a notice of default and election to sell in the office of the county recorder. NRS  
10 107.080(2)(c). That notice of default and election to sell must be mailed by "registered or  
11 certified mail, return receipt requested and with postage prepaid to the grantor or, to the person  
12 who holds the title of record on the date the notice of default and election to sell is recorded."  
13 NRS 107.080(3). The grantor then has a certain number of days in which to satisfy the  
14 deficiency. NRS 107.080(2)(a) and (b).

15 Then, after at least three months have passed from the recording of the notice of default,  
16 the trustee must give notice of the sale, including the time and place of the sale. NRS  
17 107.080(4). That notice of sale must be (1) recorded, (2) personally served upon or mailed by  
18 "registered or certified mail to the last known address of the trustor," (3) posted for 20  
19 consecutive days in a public place in the county where the property is situated, and  
20 (4) published three times, once each week for 3 consecutive weeks, in a newspaper of general  
21 circulation in the county where the property is situated. NRS 107.080(4)(a-d). Additionally, for  
22 residential properties, the notice of default and election to sell and the notice of sale must be  
23 posted in a conspicuous place on the property not later than: (1) for a notice of default and  
24 election to sell, 100 days before the date of sale; and (2) for a notice of sale, 15 days before the  
25 date of sale. NRS 107.087(1). Additional notice to tenants must be posted on the property and

1 failed with certificate of mailing to any tenant or subtenant actually occupying the property no  
2 later than 15 days before the date of sale. NRS 107.087(3).

3       Once the sale is completed, title vests in the purchaser; upon court action, however, a  
4 sale may be voided if carried out without substantially complying with the statutory  
5 requirements. NRS 107.080(5). *See Rose v. First Federal Savings & Loan*, 777 P.2d 1318,  
6 1319 (Nev. 1989).

7       Here, Defendants have failed to carry their initial burden to negate an essential element  
8 of Plaintiff's case or show that Plaintiff cannot bear his burden of proof at trial. In support of  
9 their motion, Defendants attempted to show that they complied with statutory foreclosure  
10 proceedings. However, Defendants have not demonstrated that the notice of sale was posted  
11 for 20 consecutive days in a public place in the county where the property is situated, to comply  
12 with NRS 107.080(4) posting requirements. Neither have Defendants demonstrated that the  
13 notice of default and election to sell, the notice of sale, or notice to tenants were posted in a  
14 conspicuous place on the property, in compliance with NRS 107.087. Without this evidence,  
15 Defendants have not negated an essential element of Plaintiff's case.

16       Defendants also assert that Plaintiff cannot prove that he did not receive notice.  
17 However, Defendants ignore the fact that Plaintiff need not show that he failed to receive  
18 notices, but rather that Plaintiff may succeed if Defendants cannot prove that they substantially  
19 complied with the statutory requirements. Defendants' own proffered evidence demonstrates  
20 that the notices of sale indicated the sale would take place on January 1, 2011 at 1:00 p.m., but  
21 the Trustee's Sale took place on March 4, 2011. If Defendants gave Plaintiff notice of the  
22 wrong date of sale, then Plaintiff can show substantial non-compliance with mandated notices.  
23 Defendants have offered no explanation for the discrepancy, nor have they explained why the  
24 discrepancy is immaterial. Based on the evidence before the Court, it is wholly unclear what  
25 notices, if any, Plaintiff received or whether those notices were substantially compliant with

1 statutory mandates.

2 Defendants still have not shown that proper foreclosure was effectuated such to negate  
3 an essential element of Plaintiff's case. As Defendants have failed to meet their initial burden,  
4 summary judgment must be denied. *See Adickes*, 398 U.S. at 159–60. Moreover, as there is  
5 still a live case, the motion to expunge *lis pendens* is also denied.

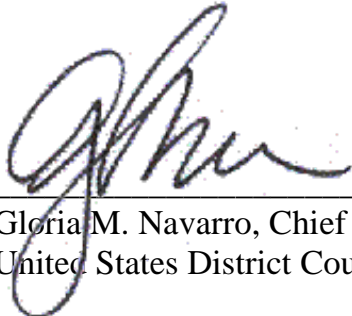
6 **IV. CONCLUSION**

7 **IT IS HEREBY ORDERED** that Defendants' Motion for Summary Judgment (ECF  
8 No. 148) is **DENIED**.

9 **IT IS FURTHER ORDERED** Defendants' Motion to Expunge Lis Pendens (ECF No.  
10 147) is **DENIED**.

11 **DATED** this 17th day of June, 2014.

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



---

Gloria M. Navarro, Chief Judge  
United States District Court